Supreme Court No. 84921-8

Snohomish County Superior Court No. 10-2-06342-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Mukilteo Citizens for Simple Government,

Appellant,

v.

City of Mukilteo, Christine Boughman, Snohomish County, Carolyn Weikel, Nicholas Sherwood, Alex Rion, Tim Eyman,

Respondents.

APPELLANT'S REPLY BRIEF

Vanessa S. Power, WSBA #30777
Leonard J. Feldman, WSBA #20961
Gloria S. Hong, WSBA #36723
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Tel: (206) 624-0900
Attorneys for Appellant Mukilteo Citizens for Simple Government

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I. INTRODUCTION

The central issue before the Court is whether proposed Mukilteo Initiative No. 2 (the "Initiative") exceeds the scope of the initiative power. Yet none of the Respondents directly addresses that issue, and none of the Respondents even attempts to argue that the Initiative is valid. Instead, Respondents try to avoid the matter completely by claiming that Mukilteo Citizens for Simple Government ("Mukilteo Citizens") lacks standing, by re-casting the Initiative as anything but an initiative, and by draping themselves in the mantle of the First Amendment. All of Respondents' avoidance tactics are baseless, and none change the fundamental conclusion that must be drawn from the facts: the Initiative is invalid.

First, Mukilteo Citizens clearly has standing to challenge inclusion of an invalid initiative on the local ballot. Mukilteo Citizens has a direct interest in the lawfulness of the actions taken by their duly elected local officials on the Mukilteo City Council and will be harmed by inclusion of an invalid initiative on the ballot. There is also a very strong – and obvious – public interest at issue in this case, which under Washington law is an independent basis for standing.

Second, Respondents' efforts to recharacterize the Initiative fail. The City's assertion that the Initiative is simply a "question" for "voter input" defies the factual record before the Court, which shows that the

Initiative is anything but advisory in nature. Intervenors' scattershot approach, which involves calling the Initiative everything from an "advisory vote" to a "conditional vote," likewise fails as a matter of fact and law. Indeed, the Initiative is just that – an initiative that the Mukilteo City Council has scheduled to be submitted to the "qualified electors of the City whether or not to *enact an initiative ordinance*." *See* CP 84-85 (emphasis added). Calling the Initiative something else does not make it so. On its face, the Initiative would repeal existing law and enact new law on a matter reserved for the Mukilteo City Council. As such, the Initiative exceeds the scope of the initiative power and should be declared invalid.

Third, Intervenors attempt to confuse the issue by claiming that Mukilteo Citizens' request for pre-election review implicates First Amendment free speech rights. But Intervenors' argument relies on cases involving requests for *substantive* pre-election review of proposed initiatives. This case is different. It involves only a request for *subject matter* pre-election review of the Initiative, which this Court has consistently found appropriate because the subject matter of an initiative is either proper for direct legislation or not.

Finally, Snohomish County's argument that this case will become moot if the ballots are printed with the Initiative ignores the fact that Mukilteo Citizens seeks both injunctive and declaratory relief. Even if it

were unable to promptly rule, the Court may still provide effective relief by holding that the Initiative was and remains invalid, thereby preventing any further harm to Mukilteo Citizens and additional litigation regarding the propriety of the Initiative.

II. ARGUMENT

A. Mukilteo Citizens Has Met All Requirements for Justiciability and Standing.

To establish justiciability, the Uniform Declaratory Judgments Act, Chapter 7.24 RCW ("UDJA") calls for:

> (1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive."

To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (*quoting Diversified Indus. Dev. Corp. v. Ripley,* 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). Intervenors question only whether Mukilteo Citizens met the first and third elements. As set forth below, those requirements have been met.

1. An Actual, Present, and Existing Dispute Exists.

The first requirement of justiciability under the UDJA is that the case must present an "an actual, present and existing dispute, or the mature

seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement." *Id.* As this Court noted in *Coppernoll v. Reed*, 155 Wn.2d 290, 299, 119 P.3d 318 (2005), cases such as this one involving only a subject matter challenge prior to an election "do not raise concerns regarding justiciability because postelection events will not further sharpen the issue, i.e., the subject of the proposed measure is either proper for direct legislation or it is not.". The same reasoning and result apply here as well.

Ignoring this portion of *Coppernoll,* Intervenors argue that this case does not present a justiciable controversy because the Initiative may never be approved by the voters, and even if approved by the voters, the Mukilteo City Council may choose to ignore the results of the election. *See* Intervenors' Response at 3. These factors are irrelevant to the subject matter challenge presented here because, as noted in *Coppernoll,* post-election events will not sharpen the issue: the Initiative is unlawful now and will remain unlawful after the election. In addition, this Court has consistently held that pre-election subject matter review is proper. *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 149 P.3d 616 (2006); *City of Sequim v. Malkasian,* 157 Wn.2d 251, 138 P.3d 943 (2006); *Coppernoll,* 155 Wn.2d 290; *Snohomish Cnty. v. Anderson,* 123 Wn.2d 151, 868 P.2d 116 (1994); *Philadelphia II v. Gregoire,* 128 Wn.2d 707,

911 P.2d 389, *cert. denied,* 519 U.S. 862 (1996). The Court should therefore reject Intervenors' argument that judicial review should be unnecessarily delayed.

2. Mukilteo Citizens Has Standing.

The third requirement under the UDJA is that a case must involve interests that are "direct and substantial, rather than potential, theoretical, abstract or academic." *To-Ro Trade Shows,* 144 Wn.2d at 411. Washington courts have held that this requirement encompasses the doctrine of standing. *Id.* at 414. A person has standing under the UDJA if the person has a sufficient factual injury and "the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* (internal quotation marks and citation omitted; ellipsis in original). Those requirements are met here.

Mukilteo Citizens has a vested interest in ensuring that its elected representatives (i.e., the Mukilteo City Council) do not act unlawfully, do not act in an inefficient manner, do not take action outside their authority, and do not unlawfully delegate their authority. CP 100. That interest, moreover, plainly lies within the zone of interests to be protected or regulated by the statute at issue. The Legislature's intent in adopting Chapter 46.63 of the Revised Code of Washington was to (1) "promote the

public safety and welfare on public highways and [2] to facilitate the implementation of a uniform and expeditious system for the disposition of traffic infractions." RCW 46.63.010. The Legislature made efforts to ensure this by expressly empowering local legislative bodies, and not the general electorate, to legislate the use and operation of Safety Cameras. RCW 46.63.170. Here, Mukilteo Citizens has a legitimate concern regarding the Mukilteo City Council's improper delegation of its authority (by calling for direct legislation via an election on the Initiative) to enact laws governing the use of Safety Cameras. *See* CP 100.

The Court has permitted private litigants to bring pre-election challenges in similar situations. For example, in *Seattle Building & Construction Trades Council v. City of Seattle*, 94 Wn.2d 740, 620 P.2d 82 (1980), an initiative was circulated by a group of citizens opposed to a design for improvement of Interstate 90. *Id.* at 745. Similar to the case at hand, in the *Seattle Building* case, the necessary signatures were obtained and the Seattle City Council passed an ordinance submitting the initiative to the voters at a special election. *Id.* The Seattle Building and Construction Trades Council filed an action for declaratory and injunctive relief against Seattle challenging the subject matter validity of the initiative. *Id.* By addressing the merits of the Building Council's claims, the Court necessarily found standing. *See Coppernoll,* 155 Wn.2d at 300

(*citing To-Ro Trade Shows,* 144 Wn.2d 403) (recognizing standing is a threshold issue).

Similarly, the Court has ruled on the merits of pre-election challenges brought by private litigants in other cases. *See, e.g.*, *Coppernoll*, 155 Wn.2d at 300-01(pre-election challenge to initiative brought by association of trial lawyers); *Ruano v. Spellman*, 81 Wn.2d 820, 505 P.2d 447 (1973) (case brought by citizen seeking injunctive relief against county to enjoin spending funds on stadium project pending vote on proposed initiative); *see also 1000 Friends of Wash.*, 159 Wn.2d 165 (declaratory judgment case brought by advocacy group (later joined by King County) regarding whether ordinances were subject to referenda).[1] These cases are directly on point, and Intervenors have not established otherwise.

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[1] The cases cited by Intervenors are inapposite. None of them deal with pre-election challenges or a situation analogous to the case at hand. *See To-Ro Trade Shows,* 144 Wn.2d 403 (whether trade show promoter had standing to seek declaration that state's enforcement of licensing law was lawful under Commerce Clause and First and Fourteenth Amendments); *In re Marriage of T.*, 68 Wn. App. 329, 842 P.2d 1010 (1993) (whether person has standing to challenge court order); *Primark Inc. v. Burien Gardens Assocs.*, 63 Wn. App. 900, 823 P.2d 1116 (1992) (whether purchaser of property abutting land had standing to seek determination that property had become county road); *Vovos v. Grant*, 87 Wn.2d 697, 555 P.2d 1343 (1976) (whether person has standing to challenge court order); *Ocean Spray Cranberries, Inc. v. Doyle*, 81 Wn.2d 146, 500 P.2d 79 (1972) (whether abutting property owner had standing to seek declaratory and injunctive relief against lessor for unlawful transfer of lease and against lessor and purchaser for unlawful conveyance of land); *State ex rel. Gebhardt v. Superior Court for King Cnty*, 15 Wn.2d 673, 680-81, 131 P.2d 943 (1942) (whether plaintiffs could compel school board to retain specific superintendent; holding that court would rule on issue even if doubtful whether plaintiffs alleged sufficient facts to entitle them to standing because of importance such decision would have to all teachers and school directors in state).

Indeed, if Intervenors' standing argument were correct – which it is not – there would be no effective mechanism to police the initiative power, where, as here, Intervenors (the Initiative sponsors) of course support the Initiative, and the City lacks the foresight to oppose (or even take a position on the validity of) the Initiative. The UDJA should not be interpreted in such an absurd fashion. *See, e.g.*, *McPherson v. Toyokaicho Wakamatsu*, 188 Wash. 320, 324, 62 P.2d 732 (1936) (court should avoid taking actions that would lead to absurd results) (*citing Anderson v. Rucker Bros.*, 107 Wash. 595, 602, 183 P. 70 (1919)). The Court should not pronounce a rule regarding standing that would, in effect, eliminate judicial review of unlawful legislation.

Finally, Intervenors' argument also ignores the substantial public interest at issue in this case, which is an independent basis for standing. *See, e.g.*, *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear,* 80 Wn.2d 175, 178, 492 P.2d 1012 (1972) (appellate courts may decide question of public interest that has been adequately briefed and argued if doing so would benefit public and government officers); *Huntamer v. Coe*, 40 Wn.2d 767, 246 P.2d 489 (1952) (affirming jurisdiction because case involved "some questions of considerable public interest and

importance").[2] Here, there is a strong public interest in determining whether the Initiative is outside the scope of the local initiative power. Contrary to Intervenors' assertions, this issue is one of statewide importance. It is likely that absent a clear ruling here, similar local initiatives will be brought in other cities across the state. The question before the Court is of public interest, has been adequately briefed, and would benefit the public and government officials. For this reason too, the Court can – and should – reach the merits of Mukilteo Citizens' arguments.

B. The City's And Intervenors' Attempts To Recharacterize The Initiative Fail As A Matter Of Fact And Law.

1. As A Matter Of Fact, The Measure Before The Court Is An Initiative.

The City and Intervenors try to convince the Court that the Initiative is not actually an initiative. But simply calling the Initiative something else does not make it so. *See State v. Lord,* 161 Wn.2d 276, 294, 165 P.3d 1251 (2007) ("Merely asserting that the State withheld information does not make it so."); *State v. Williams,* 144 Wn.2d 197, 211,

[2] *See also, Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969) ("Where a controversy is of serious public importance and immediately affects substantial segments of the population and its outcome will have a direct bearing on the commerce, finance, labor, industry or agriculture generally, questions of standing to maintain an action should be given less rigid and more liberal answer."); *Farris v. Munro*, 99 Wn.2d 326, 330, 662 P.2d 821 (1983) (plaintiff lacked personal standing but court liberally found standing to resolve important issue of constitutionality of state lottery act).

26 P.3d 890 (2001) ("[S]imply claiming the statute satisfies a compelling state interest does not make it so."); *Scott Paper Co. v. Anacortes,* 90 Wn.2d 19, 35, 578 P.2d 1292 (1978) ("Wishing it does not make it so."); *Burrier v. Mut. Life Ins. Co.,* 63 Wn.2d 266, 275, 387 P.2d 58 (1963) ("Calling it so does not make it so."). As a factual matter, the record makes clear that the Initiative is just that, an initiative.

An initiative is direct legislation by the people. *See* RCW 35.17.260 ("Ordinances may be initiated by petition of registered voters of the city . . ."). The Initiative at issue here is no exception. The Initiative calls for a new chapter of the Mukilteo Municipal Code to be "*enacted by the people of the City of Mukilteo,*" not the Mukilteo City Council. CP 82 (emphasis added). The plain language of the Initiative provides that "[a] new chapter 10.06 is hereby added to the Mukilteo Municipal Code." *Id.* Under that new chapter, the legislation would require a future advisory vote, impose new voting requirements on legislation regarding the use of Safety Cameras, and limit the fines the City may assess for infractions detected through the use of Safety Cameras. *Id.* In addition, the Initiative calls for repeal of an existing chapter of the Mukilteo Municipal Code governing the City's use of Safety Cameras. *Id.* All of these characteristics show that the Initiative is an initiative – an ordinance proposed for enactment directly by the people.

Indeed, despite conclusory statements otherwise, the City already conceded that the Initiative is a legislative ordinance by initiative petition. In Resolution 2010-22, the Mukilteo City Council requested the Snohomish County Auditor to place the Initiative on the ballot "[p]ursuant to RCW 35.17.260." CP 84-85. RCW 35.17.260 establishes requirements for legislative ordinances by initiative petition. Specifically, the statute provides that once procedural requirements are met the city council shall either:

> (1) Pass the proposed ordinance without alteration within twenty days after the county auditor's certificate of sufficiency has been received by the commission; or
>
> (2) Immediately after the county auditor's certificate of sufficiency for the petition is received, cause to be called a special election . . . unless a general election will occur within ninety days, in which event submission must be made on the general election ballot.

RCW 35.17.260. Here, the Mukilteo City Council opted not to pass the proposed ordinance and instead called for an election "submitting to the qualified electors of the City whether or not to *enact an initiative ordinance*." CP 84-85 (emphasis added). In doing so, the City recognized that the Initiative is just that, an ordinance put to a vote of the people by initiative.

According to the City, the Initiative "alone would not enact law," and the Mukilteo City Council "will need to take action to amend its

traffic safety camera ordinance after the election, should it be the desire of the City Council." *See* City Response at 3, 4. This is incorrect. Under RCW 35.17.330, if the Initiative passes, "it *shall become effective immediately* and shall be made a part of the record of ordinances of the city." (emphasis added). Nothing in the Initiative, or the Resolution calling for an election on the Initiative, alters the effective date of the proposed legislation or conditions it on any subsequent action by the Mukilteo City Council.

The City's argument that this case is not about the validity of the Initiative, but about the Mukilteo City Council's desire to hear from its electorate through use of the ballot, is misleading. If that were the case, the issue before the Court would be an advisory vote or a referendum, a legislative ordinance enacted by the City Council subject to approval by the voters. But the issue before the Court is neither. By its terms, and as confirmed by the Mukilteo City Council's actions, it is an initiative. Nor is the Initiative "conditional legislation." Nothing in the Initiative, or the Resolution calling for a vote on the Initiative, conditions enactment of the Initiative on any future event.

Finally, the language of the Resolution does nothing to alter the nature of the Initiative as direct legislation. The Resolution does the following: (1) it calls for an election "submitting to the qualified electors

of the City whether or not to enact an initiative ordinance"; (2) it sets forth the ballot title; (3) it authorizes and directs the Mukilteo City Clerk to give the Snohomish County Auditor a copy of the Resolution and to publish the Initiative in the City's official newspaper before the election date; and (4) it directs the City Attorney to prepare and submit the explanatory statement for the Initiative. CP 84-86. The Resolution does not alter the Initiative in any way. It does not condition the Initiative on future action by the Mukilteo City Council, and it makes no reference to the public vote on the Initiative being only advisory in nature. Indeed, by its very terms the Mukilteo City Council already recognized that the Initiative is direct legislation by calling it an "initiative ordinance" in the Resolution. CP 85.

In sum, the language of the Initiative, the language of the Resolution, and the Mukilteo City Council's actions all make clear that the Initiative is precisely what it is entitled, an initiative.

2. The City May Not Evade State Law Precluding Direct Legislation On A Subject Reserved For Local Legislative Bodies.

The City's argument that it can evade controlling case law by calling the Initiative something else also fails legally. The City's argument, if accepted by this Court, would work an absurd result and "violate the constitutional blueprint" of the State by allowing a "subdivision of the State to frustrate the mandates of the people of the

State as a whole." *1000 Friends of Wash.*, 159 Wn.2d at 167. Thus, the City's "advisory vote" argument should be rejected on legal as well as factual grounds.

This Court has reviewed many cases involving limitations on the local initiative power where, as here, the Legislature vested power to enact legislation on a specific subject with local legislative bodies. In none of those cases did the local legislative body attempt to evade limits on the local initiative power by claiming that the initiative or referendum at issue was something other than direct legislation by the people. *See, e.g., 1000 Friends of Wash.*, 159 Wn.2d 165 (advocacy group, later joined by King County, filed declaratory judgment action contending ordinances not subject to referenda); *Futurewise v. Reed*, 161 Wn.2d 407, 166 P.3d 708 (2007) (advocacy group and union filed action for declaratory and injunctive relief contending proposed statewide initiative was unconstitutional); *Malkasian*, 157 Wn.2d 251 (city filed action for declaratory and injunctive relief contending local initiative was beyond scope of initiative power). These cases show that the City's "advisory vote" argument is baseless. Indeed, if the City's argument were accepted by this Court, Washington courts would be powerless to prevent similar constitutional abuses in subsequent cases.

Not surprisingly, the City offers no legal support for its argument. Other than a failed attempt to re-cast the Initiative as something else, the City offers no basis excusing its bold attempt to circumvent state law. Where, as here, the Legislature granted authority to local legislative bodies to enact laws regarding the use of Safety Cameras, that authority is not subject to repeal, amendment, or modification by initiative or referendum. *Id.* at 265. The City's delegation of that authority by allowing for direct legislation through the Initiative is improper as a matter of law. And calling the Initiative something else does not, and cannot, change that result.

C. Pre-Election Review To Determine The Subject Matter Validity Of An Initiative Is Proper And Does Not Implicate First Amendment Rights.

Intervenors' contention that Mukilteo Citizens' request for pre-election review infringes on the constitutional rights of the people is without merit because their argument fails to distinguish between *substantive* and *subject matter* initiative challenges. Here, Mukilteo Citizens seeks only *subject matter* review of the Initiative to determine whether it exceeds the scope of the initiative power. Addressing such challenges, the Court has consistently held that "[i]t is well-settled that it is proper to bring such narrow challenges prior to an election." *Id.* at 260.

The cases relied upon by Intervenors do nothing to further their argument. In those cases, the Court confirmed that pre-election review is appropriate in subject matter challenges, which is the case presented here. *See Coppernoll,* 155 Wn.2d at 297, 299 (conducting pre-election review of initiative's *subject matter* validity but expressing no opinion on *substantive* validity of initiative; Court recognized "narrow exceptions to this general rule against preelection review" including "where the subject matter of the measure was not proper for direct legislation"); *Futurewise,* 161 Wn.2d at 411 (declining to engage in *substantive* pre-election review but noting pre-election review appropriate where challenge is "that the subject matter of the initiative is beyond the people's initiative power"). Because Mukilteo Citizens is asserting precisely such a subject matter challenge, pre-election review is appropriate here.

Intervenors' First Amendment argument is equally baseless. Intervenors contend that prohibiting an election on the Initiative would violate the free speech interests of people to campaign and vote as part of the initiative process. *See* Intervenors' Response at 15-17. That argument fails because it is premised on the mistaken assertion that Mukilteo Citizens is asserting a *substantive* challenge to the Initiative. *See Coppernoll,* 155 Wn.2d at 298 ("Because ballot measures are often used to express popular will and to send a message to elected representatives. . .

substantive preelection review may also unduly infringe on free speech values.") (internal citation omitted). Because this case presents only a subject matter challenge, Intervenors' First Amendment argument is not relevant.

D. The Case Will Not Become Moot Because The Court Can Grant An Effective Remedy.

Although Snohomish County urges the Court to promptly review this case (as does Mukilteo Citizens), it claims that if the ballots are printed on September 10, 2010 with the Initiative included, then the case will become moot as to claims against Snohomish County. That argument applies only to Mukilteo Citizens' claim for injunctive relief. Significantly, Mukilteo Citizens also seeks a declaratory judgment that the Initiative is beyond the scope of the initiative power of the residents of Mukilteo as well as any other relief the Court deems just and equitable. Snohomish County's mootness argument therefore fails.

This Court's opinion in *Malkasian,* 157 Wn.2d 251, is directly on point. In *Malkasian*, Sequim requested the same relief sought here: (1) an injunction preventing the initiative from being placed on the ballot; (2) a declaratory judgment that the initiative is beyond the scope of the initiative power and thus invalid; and (3) any other relief the court deems just. 157 Wn.2d at 260. This Court held that although the election had

already taken place in that case, "other effective remedies exist" including "if this court finds that the subject matter of the initiative was outside the scope of the relevant initiative power, this court can invalidate the initiative." *Id.* at 260-61. As a result, this Court held that because it could grant an effective remedy, the pre-election challenge regarding the subject matter validity of the initiative was not moot.

The same analysis applies here. The Court should promptly address Mukilteo Citizens' arguments and thereby avoid any mootness concerns. But if its decision were to be delayed beyond September 10, 2010, Mukilteo Citizens seeks a declaratory judgment that the Initiative is invalid and other relief as the Court deems appropriate. As such, although Mukilteo Citizens (like Snohomish County) urges the Court to decide this appeal before September 10, 2010, the Court can properly invalidate the Initiative either before or after the ballots are printed, and – contrary to Snohomish County's argument – the case does not become moot after September 10, 2010.

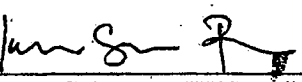
III. CONCLUSION

In sum, attempts by the City and Intervenors to recharacterize the Initiative as something other than an initiative fail as a matter of fact and law. The factual record demonstrates that the measure before the Court is an initiative. And Respondents do not dispute that RCW 46.63.170

precludes initiatives and referenda that would enact local ordinances on the subject of Safety Cameras. Because the Initiative would usurp authority granted exclusively to local legislative bodies, it exceeds the scope of the initiative power of the people of Mukilteo. As such, the Court should hold that the Initiative is invalid and cannot be included on the November 2, 2010 ballot.

Respectfully submitted this 25th day of August, 2010.

STOEL RIVES LLP



Vanessa S. Power, WSBA #30777
Leonard J. Feldman, WSBA #20961
Gloria S. Hong, WSBA #36723

Attorneys for Appellant Mukilteo Citizens for Simple Government

CERTIFICATE OF SERVICE

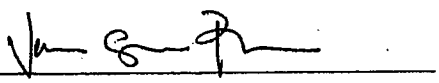
I, Vanessa Power, certify under penalty of perjury under the laws of the State of Washington that, on August 25, 2010, I caused the foregoing document to be served on the persons listed below in the manner shown:

Angela S. Belbeck
Ogden Murphy Wallace, PLLC
1601 Fifth Avenue, Suite 2100
Seattle, WA 98101
abelbeck@omwlaw.com
Counsel for City of Mukilteo and Christine Boughman
By Electronic Service and U.S. Mail

Richard M. Stephens
Groen Stephens & Klinge LLP
11100 NE 8th Street, Suite 750
Bellevue, WA 98004
rstephens@gskonline.com
Counsel for Nicholas Sherwood, Alex Rion, Tim Eyman
By Electronic Service and U.S. Mail

Gordon W. Sivley
Snohomish County Prosecuting Attorney – Civil Division
3000 Rockefeller Ave
Everett, WA 98201
gsivley@snoco.org
Counsel for Snohomish County and Carolyn Weikel
By Electronic Service and U.S. Mail

Dated this 25th day of August at Seattle, Washington.



Vanessa Soriano Power